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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CITY OF SIERRA VISTA, Plaintiff/Appellee, v. ANTHONY S. WENC, Defendant/Appellant.	**Case No. 2 CA-CV 2018-0010** Cochise County Superior Court Cause No. CV201700395

REPLY BRIEF

Table of Contents

Table of Authorities

Cases

Statutes and Code Provisions

Legal Argument

1. The City of Sierra Vista Code definition of "inoperative vehicle" is both unconstitutionally vague and facially invalid.

The City acknowledges that an ordinance can be void for vagueness if it fails to give people of ordinary intelligence a chance to know what type of conduct is lawful and what type is prohibited—and if it encourages arbitrary enforcement. *Answering Brief* at 9 (citing *State v. Phillips*, 178 Ariz. 368, 370 (App. 1984). It is, in fact, legislatively "declared" Arizona "public policy" that punitive laws are to "give fair warning of the nature of the conduct proscribed." A.R.S. § 13-101(2).

The central problem with City of Sierra Vista Code § 150.02 is that it loosely defines an "inoperative" vehicle as one that is "not in working condition as designed" or that is "incapable of being operated lawfully." The definition is too generalized and malleable to provide fair warning to any person of ordinary sense about what conduct is unlawful and could instigate a citation and punishment.

After all, any vehicle that has a dry gas tank, a flat tire, a broken headlamp, or a dead battery qualifies as a vehicle "not in working condition" as it was designed to work. So any City inspector could arbitrarily cite a person for having that vehicle on that person's private property although it was only briefly out of street condition because of such things as no gas, a flat tire, a broken headlamp, a dead battery, or similar passing flaws. A person of ordinary intelligence would not expect or understand that this sort of routine, transitory problem would transform

the vehicle into an "inoperative vehicle" and result in a citable, punishable offense.

The same unexpected result can occur with Section 150.02's "incapable of being operated lawfully" words. Even if a vehicle is parked on private property and the owner has no intent to operate the vehicle on a public street, the "incapable of being operated" words would apparently apply. Thus, any City inspector could arbitrarily cite a person for having an uninsured and/or unregistered vehicle on his or her private property although the owner had no intent to operate it on a public street—and the vehicle violated none of the comprehensive statewide laws on mandatory insurance and/or mandatory vehicle registration.

Once again, a person of ordinary intelligence would neither expect nor understand that merely parking an uninsured and/or unregistered vehicle on private property—and not driving it or having any intent to drive in on a public street—would transform that vehicle into an "inoperative vehicle" and thus result in a citable, punishable offense.

The City argues that additional words in its ordinance overcome any issue with vagueness or arbitrary enforcement. But the additional words do not eliminate the ordinance's vagueness or its susceptibility to arbitrary enforcement.

First, the City relies on a phrase providing that a "motor vehicle designed to be operated upon the public streets shall be deemed inoperative if a tag with a current registration (also known as a license plate) of a kind required under

Arizona law as a condition of operation upon the public streets is not affixed thereto." *Answering Brief* at 9. But that is just another way of saying the vehicle is unregistered—and adds no force or clarity to the City's original argument.

Second, the City relies on a phrase providing that a vehicle shall be deemed inoperative "if one (1) or more parts which are required for the operation of the vehicle are missing or not attached to the vehicle as designed." But a vehicle is only momentarily not operable if it is temporarily missing a battery, or a fuel pump, or a voltage regulator, or several spark plugs, or any of the many parts needed to make a vehicle work. If the vehicle is parked on private property, with no intention by the owner to operate it on a public street, a person of reasonable intelligence would not expect or understand that having the vehicle on private property in that condition would be a citable, punishable offense.

Third, the City contends its ordinance is not vague "because, to constitute a nuisance in violation of the Code, an inoperative vehicle must exist, uncovered, ungaraged and out in the open, for a period of time greater than thirty days." *Answering Brief* at 10. But a person of reasonable intelligence would not expect that openly having a vehicle on private property for more than 30 days would be some sort of citable, punishable offense simply because that vehicle could not be immediately operated on a public street and/or that vehicle lacked state-mandated motor-vehicle insurance and/or lacked state-mandated registration.

In his Opening Brief, Wenc cited examples of motor vehicles that a City inspector *could* regard and cite as "inoperative vehicles." The examples included: (1) a vehicle with lost ignition keys; (2) a vehicle with a temporarily removed battery; (3) a vehicle with a flat tire; and (4) a vehicle that had run out of gas. *Opening Brief* at 19-21. The City admitted that "each of Wenc's examples of an inoperative vehicle could at some point lead to a violation of the Code." *Answering Brief* at 11. That is the point. The ordinance's imprecision, malleability, and far-reaching words invite arbitrary enforcement.

2. State law preempts the City of Sierra Vista Code definition of "inoperative vehicle."

The City next argues State law does not preempt the City of Sierra Vista's definition of an "inoperative vehicle." *Answering Brief* 11-14. The City claims that a State statute can only preempt a local ordinance if three requirements are met:

(1) the city creates a law conflicting with state law;

(2) the State law is of statewide concern; and

(3) the Legislature intended to appropriate the field through a clear preemption policy.

Answering Brief 11-12 (citing *City of Prescott v. Town of Chino Valley*, 163 Ariz. 608, 616 (App. 1989), *vacated in part on other grounds*,166 Ariz. 480 (1990)).

Having said that, the City admits it "may agree that Arizona's registration and insurance statutes meet the second and third requirements of *Chino Valley*."

Answering Brief 12-13. That leaves the first requirement, namely, the requirement that the City must have created a local law conflicting with state law.

The City tries to finesse that first requirement by claiming that its "code does not regulate the registration or insuring of motor vehicles in any way" because the City adopted the Code "to regulate the upkeep and maintenance of real property located within the City." *Answering Brief* at 13. The Legislature, however, has appropriated the fields of motor-vehicle insurance, motor-vehicle registration, and, for that matter, motor-vehicle equipment and operability. The Legislature did that by creating a comprehensive, detailed, statewide set of statutes governing those areas. When the Legislature has thoroughly occupied legislative areas in that way, local governments have no right to create their own independent coercive and punitive laws regulating the same areas.[1]

Deciding whether "general state laws displace charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest." *City of Tucson v. State*, 229 Ariz. 172, 176 ¶ 20 (2012). In *City of Scottsdale v. State*, 237 Ariz. 467, 472 ¶ 23 (App. 2015), this Court held that a State statute prohibiting outright municipal bans on "sign walkers" regulated a matter of

[1] For regulating motor vehicles, the Legislature has declared that a "local authority" may "*not* enact or enforce an ordinance or regulation in conflict with Title 28's Chapter 3 (legislative traffic and vehicle regulations), Chapter 4 (driving under the influence), and Chapter 5 (penalties and procedures for vehicle violations). A.R.S. § 28-626(B)(1) (emphasis added).

statewide interest and preempted a city ordinance banning "sign walkers" from conducting business on city sidewalks, despite the City's right, as a charter city under the Arizona Constitution, to regulate matters of local concern.

In the 2014 *Coles* case, this Court held that A.R.S. § 36-2031, which bans local governments from criminalizing public drunkenness, preempted Scottsdale City Code § 19-8(a), which criminalized public drunkenness. *State v. Coles*, 234 Ariz. 573, 577 ¶¶ 8-9, (App. 2014). And in *State ex rel. Baumert v. Municipal Court*, 124 Ariz. 159, 160-61 (App. 1979), this Court invalidated a city ordinance criminalizing indecent exposure based on a definition that differed from the State statutory definition of indecent exposure.

In *Jett v. City of Tucson*, 180 Ariz. 115, 121-22 (1994), the Arizona Supreme Court held that removing city magistrates from office was a subject of "statewide concern" for purposes of determining if the state statute providing cities with authority to appoint and compensate city magistrates precluded the city from authorizing in its city charter a process for removing magistrates from office.

In the 1935 *Keller* opinion, the Arizona Supreme Court held that the "'state, acting through its Legislature, has plenary power over the highways of the state, including those within cities and towns.'" *Keller v. State*, 46 Ariz. 106, 113 (1935) (quoting *Clayton v. State*, 38 Ariz. 135, 140 (1931)).

In *Keller*, the Arizona Supreme Court held that a city ordinance penalizing

reckless driving was invalid because of a state law that completely covered the same subject. That subject was one of statewide concern where the Legislature had appropriated the field and declared the governing rule. *Keller*, 46 Ariz. at 114-15. In *Clayton*, the Arizona Supreme Court had likewise held that the City of Phoenix had no power to pass an ordinance making it a crime to drive a motor vehicle on highways while under the influence of intoxicating liquor, because the Legislature had fully covered the subject. *Clayton*, 38 Ariz. at 146.

When an issue has statewide concern and the Legislature has "'appropriated the field by enacting a statute pertaining thereto, that statute governs throughout the state, and local ordinances contrary thereto are invalid.'" *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 559 (1978) (quoting *Phoenix Respirator & Ambulance Service, Inc. v. McWilliams*, 12 Ariz. App. 186, 188 (1970)).

Here, the City seeks to impose punitive sanctions against persons simply because motor vehicles on their private property—and not being operated on public streets—are unregistered and/or are uninsured. The City is trying to do that although State law admittedly does *not* require that motor vehicles be registered and/or insured unless those vehicles are being operated on public streets.

For that matter, the City is also trying to regulate and punish motor-vehicle owners for having non-operable vehicles on private property, although State law comprehensively regulates motor-vehicle condition, equipment, and operability.

See, e.g., A.R.S. § 28-921(A)(1) ("A person shall not 1. Drive or move and the owner shall not knowingly cause or permit to be driven or moved on a highway a vehicle or combination of vehicles that: (a) Is in an unsafe condition that endangers a person. (b) Does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment as required in this article. (c) Is equipped in any manner in violation of this article.").

In its Answering Brief, the City glides over the fact that only the State has the right to impose mandatory motor-vehicle insurance and registration laws because the Legislature has appropriated and preempted that field of legislation by its statewide and comprehensive statutes dealing with those matters. The City thus has no right to punish motor-vehicle owners for not registering and/or for not insuring vehicles that are located solely on private property and that will not be operated on public streets.

Only the State has the right to punish people for violating motor-vehicle insurance and/or registration laws. The City cannot legislate on motor-vehicle insurance and registration. And it therefore has no right to directly or indirectly punish or penalize people for not insuring and/or not registering motor vehicles. For that matter, because of the comprehensive, statewide statutes on motor-vehicle condition, operability, and equipment, the State has preempted that field as well.

See A.R.S. §§ 28-921 to 28-964 (equipment requirements);[2] A.R.S. §§ 28-981 to 28-982 (mandatory equipment, vehicle inspections, notices of repair or adjustment, compliance with inspection laws); and A.R.S. §§ 28-4881 to 28-4882 (identification and disposition of junk vehicles).

"When," as in the fields of Arizona motor-vehicle insurance, registration, and operability, "the subject of legislation is a matter of statewide concern the Legislature has the power to bind all throughout the state including charter cities." *City of Scottsdale v. Scottsdale Associated Merchants, Inc.*, 120 Ariz. 4, 5 (1978).

The City's final contention is that its real-property Code provisions support the State's motor-vehicle registration and insurance requirements by encouraging the City's residents to comply with State motor-vehicle registration and insurance requirements. *Answering Brief* at 14.

But like all other Arizona municipal police officers who enforce state traffic laws, City of Sierra Vista police officers already enforce State motor-vehicle registration and insurance laws when they ticket motorists on public streets who lack current registration tags for their motor vehicles and/or who fail to provide proof of motor-vehicle insurance during police encounters on public streets. The City has no right or need to use its municipal Code to intrude into or infringe on

[2] "Sections 28-921 to 28-964 are a legislative attempt to regulate items of equipment which are relevant to the safe operation of motor vehicles: headlights, for example." *State v. Jacobson*, 121 Ariz. 65, 70 (App. 1978), *overruled on other grounds*, *Levitz v. State*, 126 Ariz. 203 (1980).

the State's comprehensive regulation, enforcement, and compliance process for motor-vehicle insurance and registration.

3. The City of Sierra Vista Code creates an unconstitutional irrebuttable presumption.

The City admits that, to prove a motor vehicle is inoperative under its Code, it "has the burden" to establish that:

> (1) more than one vehicle is located openly on a property,
>
> (2) the vehicle or vehicles in question are missing essential parts, preventing them from operating mechanically, or the vehicles are not currently registered or otherwise able to be operated lawfully on a public street;
>
> (3) the vehicles have been in this condition for more than 30 days; and
>
> (4) they are not covered, garaged, or stored under a carport.

Answering Brief at 15.

Once those things are established, a presumption arises that a vehicle is in fact inoperative and a nuisance, even if that vehicle could be operated on a public street just by doing such things as: (1) getting insurance for it, (2) registering it; (3) filling it with gas; (4) replacing its battery; and/or (5) making simple repairs.

None of that matters to the City's citation and prosecution of a person who allegedly has an inoperative vehicle. Once the City has satisfied itself that it has complied with its own four-part test, an irrebuttable presumption arises that the subject vehicle is a "nuisance," because it is supposedly inoperative, even if the

motor vehicle really is what any reasonable person would call operable and not any form of nuisance.

"Conclusive or irrebuttable presumptions" are ones that unconstitutionally relieve the government of its burden of proof. *Norton v. Superior Court*, 171 Ariz. 155, 158 (1992). Because the City's ordinance creates an irrebuttable presumption that shifts the burden of persuasion about existence of a nuisance from the City to the property owner, the ordinance violates due process and is unenforceable. *See State v. Seyrafi*, 201 Ariz. 147, 150 ¶ 8 (2001) ("A statute that shifts the burden of persuasion on an element of the offense to a criminal defendant violates due process."); *State v. Childress*, 78 Ariz. 1, 4-5 (1954) ("Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property" because it is not within the legislative prerogative to declare someone presumptively guilty of committing an offense.).

4. The City of Sierra Vista Code treatment of "litter" and "debris" is unconstitutionally vague and facially invalid.

As the Opening Brief stated, the City claimed Wenc violated the sanitation code because an allegedly "dilapidated" or "discarded" evaporative cooler and "several old fence panels" were supposedly present on the private property. *Appellee's Memo.* at 3:3-6; 7:9-11 (08/03/2017) [ROA 2 ep 18, ep 22] According to the City, the municipal court "properly found that the items constituted 'debris' and 'litter' as prescribed by the Code." *Appellee's Memo.* at 7:12-14 (08/03/2017)

[ROA 2 ep 22] But as this Court has reminded us, "one man's trash is another man's treasure." *State v. Nichols*, 181 Ariz. 56, 58 (App. 1994).

The definitions of "debris" and "litter" are vague and confusing. "Litter" is defined as "waste" that is "tending to create an unsightly condition and having an adverse effect upon the health, safety, economic, aesthetic, or general welfare of adjoining properties or occupants thereof." *Answering Brief* at 18 (quoting Sierra Vista City Code § 150.02). But what a landowner regards as sightly and not having any adverse effect on health, safety, economic, or general welfare a City inspector could subjectively regard in the opposite way.

The definition of "debris" is "junk" that is "abandoned, broken, or neglected, or the scattered remains of something of little or no apparent economic value." *Answering Brief* at 18-19 (quoting Sierra Vista City Code § 150.02). The difficulty is that what a landowner regards as not abandoned, not broken, or not neglected—or something of great or apparent economic value to himself or herself—a City inspector could at any point subjectively regard in the opposite way.

A law is void for vagueness if it fails to give people of ordinary intelligence a chance to know what type of conduct is lawful and what type is prohibited and if it encourages arbitrary enforcement. Here, the definitions of "debris" and "litter" are so malleable and subjective that a person of ordinary intelligence keeping materials on his or her property for later use or because he or she likes the look of

them where they are might not know that doing that was unlawful. That malleability and subjectivity encourage arbitrary enforcement.

5. Attorney's fees and costs.

Wenc submits he has established that relevant parts of the City of Sierra Vista Code are vague, that State law preempts the Code's insurance, registration, and motor-vehicle equipment and operability provisions, and that the Code improperly creates irrebuttable presumptions. If Wenc prevails in this matter he asks for a recovery of his costs under A.R.S. § 12-341 and his attorney's fees under A.R.S. § 12-348(A)(1).

Conclusion

The "inoperative vehicle" provision, which creates a per se conclusion of "nuisance," is facially invalid since it: (1) violates the void-for-vagueness doctrine; (2) is preempted by State law on motor-vehicle registration, insurance, and equipment, and (3) unconstitutionally creates an irrebuttable presumption. The "litter" and "debris" provisions are also facially invalid, because they violate the void-for-vagueness doctrine.

Anthony Wenc respectfully asks the Court to vacate the judgment and judicial rulings entered against him and to remand this matter for dismissal by the superior court and municipal court of all charges related to the four cited motor vehicles and to the sanitation-related violation.

DATED this 29th day of November, 2018.

AHWATUKEE LEGAL OFFICE, P.C.

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